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Interim Lead Class Counsel for Direct Purchaser Plaintiffs

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN RE CAPACITORS ANTITRUST LITIGATION

THIS DOCUMENT RELATES TO:
ALL DIRECT PURCHASER ACTIONS

Master File No. 14-cv-03264-JD

**DIRECT PURCHASER PLAINTIFFS'
NOTICE OF MOTION AND MOTION
TO STRIKE OR, ALTERNATIVELY,
OPPOSITION TO DEFENDANT
TOSHIN KOGYO CO., LTD.'S
IMPROPERLY FILED MOTION TO
DISMISS CONSOLIDATED CLASS
ACTION COMPLAINT;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT THEREOF**

Date: May 6, 2015
Time: 9:30 a.m.
Courtroom: 11, 19th Floor

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on May 6, 2015 at 9:30 a.m., or as soon thereafter as this matter may be heard in Courtroom 11, 19th Floor, 450 Golden Gate Avenue, San Francisco, California, 94102, Direct Purchaser Plaintiffs (“DPPs”) will and hereby do move the Court to strike Defendant Toshin Kogyo Co., Ltd.’s (“Toshin Kogyo”) purported Motion to Dismiss (Dkt. 600; the “Motion”) because Toshin Kogyo has failed to appear in this action or present its purported Motion through qualified legal

1 counsel as required under Civil Local Rule 3-9(b) and well-settled case law, which together provide that
 2 corporations may not appear before the Court except through an attorney admitted to the Court's bar.
 3 In addition, the Court should strike the Motion because it violates the Court's Scheduling Orders, even
 4 though Toshin Kogyo was on notice of the Plaintiffs' claims in the instant actions well in advance of the
 5 deadline set in those Orders for filing motions to dismiss.

6 DPPs note that the instant Motion essentially repeats the previous, nearly identical and similarly
 7 deficient purported motion to dismiss filed on Toshin Kogyo's behalf (Dkt. 430). In fact, the same
 8 "Representative Director" of Toshin Kogyo signed both motions. An earlier Order of this Court (Dkt.
 9 457) dismissed the prior purported motion to dismiss on the same bases raised here. Toshin Kogyo did
 10 not heed the Court's prior Order, requiring the undersigned to devote unnecessary attorney time, out of
 11 pocket costs and other resources to this purported Motion.

12 This Motion to Strike is based on this Notice and Motion, the Memorandum of Points and
 13 Authorities filed herewith, the related papers filed in connection with Plaintiffs' prior Motion to Strike
 14 and any other and such pleading, papers and argument submitted prior to or at hearing on this Motion
 15 to Strike.

16 Alternatively, DPPs oppose Toshin Kogyo's Motion to Dismiss on the bases set forth in the
 17 following Memorandum of Points and Authorities. In addition to the arguments DPPs assert in favor of
 18 striking the Motion, Toshin Kogyo's Motion is also procedurally improper as it challenges DPPs'
 19 factual allegations and not the legal sufficiency of DPPs' claims.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT OF ISSUES TO BE DECIDED (CIVIL L.R. 7-4(a)(3))

1. Should Toshin Kogyo’s purported Motion to Dismiss Consolidated Class Action Complaint (“Motion”), which was filed by a corporate “Representative Director” who is not a member of the bar of this Court, be stricken for violating Civil L.R. 3-9(b), which provides that “[a] corporation, unincorporated association, partnership or other such entity may appear only through a member of the bar of this Court”?
2. Should Toshin Kogyo’s purported Motion be stricken for failure to follow the Court’s Scheduling Orders, despite Toshin Kogyo’s receipt of valid service well in advance of the deadline for motions to dismiss?
3. Alternatively, should the Court deny Toshin Kogyo’s purported Motion due to its procedural shortcomings and its failure to challenge the legal sufficiency of DPPs’ claims for relief?

II. PROCEDURAL AND FACTUAL BACKGROUND

On July 18, 2014, Plaintiff Chip-Tech, Ltd. (“Chip-Tech”) filed an antitrust class action complaint against the leading global manufacturers of capacitors for violation of Section 1 of the Sherman Act. *See* Dkt. 1. The *Chip-Tech* complaint alleged that Toshin Kogyo—a corporation organized under Japanese law and a manufacturer of aluminum and tantalum electrolytic capacitors—participated in a nearly decade-long price-fixing cartel formed among its fellow leading manufacturers of electrolytic capacitors to fix, raise, maintain or stabilize prices for their capacitors sold both globally and in the United States. *See id.* at ¶¶ 55, 114-134. Toshin Kogyo was served on October 29, 2014 in Japan with a translated copy of the *Chip-Tech* complaint by APS International pursuant to the Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (“Hague Convention”) under the framework of the Hague Convention on Private International Law. *See* Dkt. 432.

On November 14, 2014, following consolidation of the *Chip-Tech* action with several related actions (in the instant case, the “Consolidated Action”), an initial case management conference, and the appointment of interim lead class counsel, DPPs filed a Consolidated Class Action Complaint

1 (“CCAC”; Dkt. 347-1 redacted; Dkt. 401 unredacted) that again named Toshin Kogyo as a member of a
 2 decade-long price-fixing cartel in the capacitors industry. *See* Dkt. 401 at ¶¶ 74, 198, 208, 287.

3 On December 4, 2014, Kenji Kasahara, a “Representative Director of Toshin Kogyo Co., Ltd.”,
 4 filed a purported motion to dismiss the *Chip-Tech* Action on Toshin Kogyo’s behalf. Dkt. 430, at p. 4.
 5 On December 18, 2014, Chip-Tech filed a motion to strike this first purported motion to dismiss (Dkt.
 6 439) for violating Civ. L. R. 3-9(b) as well as the Court’s Scheduling Orders. The Court issued an Order
 7 striking Toshin Kogyo’s motion to dismiss the following day, December 19, 2014 (Dkt. 457). DPPs
 8 transmitted a copy of the Order to Toshin Kogyo on the same day it issued, and FedEx confirmed
 9 successful delivery to Toshin Kogyo’s offices in Tokyo on December 24, 2014. *See* Dkt. 616.

10 Although Toshin Kogyo has been on actual notice of DPPs’ claims since at least October 29,
 11 2014, the date it received valid Hague Convention service of process in the *Chip-Tech* action, DPPs
 12 pursued service of the CCAC on Toshin Kogyo as well. It appears that these efforts were successful and
 13 Toshin Kogyo received the CCAC on March 6, 2015. *See* Dkt. 600 at 2. Yet Toshin Kogyo persists in its
 14 refusal to make an appearance before this Court through qualified legal counsel. Instead, Mr. Kasahara
 15 filed the instant Motion (Dkt. 600), which repeats, often verbatim, the language from the prior stricken
 16 motion to dismiss.

17 No attorney claiming to be a member of the bar of this Court is identified on the Motion as
 18 representing Toshin Kogyo in connection with this filing or even generally. To date, no attorney has
 19 appeared on Toshin Kogyo’s behalf either in any of the underlying pre-consolidation actions or in the
 20 Consolidated Action.

21 **III. ARGUMENT**

22 **A. Toshin Kogyo’s purported Motion must be stricken because its appearance has not
 23 been made through a member of the bar of this Court.**

24 The Ninth Circuit and this Court require that “[c]orporations and other unincorporated
 25 associations must appear in court through an attorney.” *Licht v. Am. W. Airlines*, 40 F.3d 1058, 1059 (9th
 26 Cir. 1994) (quoting *Rowland v. California Men’s Colony*, 506 U.S. 194, 202 (1993)); *United States v. High
 27 Country Broad. Co., Inc.*, 3 F.3d 1244, 1245 (9th Cir. 1993) (same). *See also U.S. Commodity Futures
 28 Trading Com’n v. Castillo*, No. C06-2540 THE, U.S. Dist. LEXIS 55107, at *1 (N.D. Cal. July 19, 2007)

1 ("Moreover, that a corporation must be represented by licensed counsel has been well-established by
 2 Supreme Court precedent and is not only a requirement of this Court's local rules.").

3 Indeed, this Court's Local Rules plainly require that "a corporation, unincorporated association,
 4 partnership or other such entity may appear only through a member of the bar of this Court." Civil L.R.
 5 3-9(b) (2014). *See BMW of North America, LLC v. Dinodirect Corp.*, No. C 11-04598 WHA, 2012 U.S.
 6 Dist. LEXIS 89271, at **13-14 (N.D. Cal. June 27, 2012) (relying on Civil L.R. 3-9(b) to deny
 7 consideration of filings by corporate officers); *Juniper Networks, Inc. v. Juniper Media, LLC*, No. C 11-
 8 03906 WHA, 2001 U.S. Dist. LEXIS 122793 (N.D. Cal. Oct. 24, 2011) (same); *DR JKL Limited v. HPC*
 9 *IT Education Center*, F. Supp. 2d 1038, 1048 (N.D. Cal. 2010) (striking answer filed on a company's
 10 behalf by a non-lawyer pursuant to Civil L.R. 3-9(b)).

11 By its own admission (Dkt. 600) and in confirmation of Chip-Tech's allegations (Dkt. 401, at ¶
 12 74), Toshin Kogyo is a corporate "entity organized under the Japanese law" and, pursuant to Civil L.R.
 13 3-9(b), therefore must be represented in this case by a member of the bar of this Court. Mr. Kasahara,
 14 the signatory on the purported Motion, identifies himself only as "Representative Director of Toshin
 15 Kogyo Co., Ltd." *See* Dkt. 600, at pp. 1, 5, Certificate of Service. Nowhere in the Motion is Mr.
 16 Kasahara identified as an attorney in any jurisdiction, much less as an attorney authorized to practice
 17 before this Court.

18 Just as before, Mr. Kasahara therefore may not represent Toshin Kogyo in this action, nor can he
 19 file a motion to dismiss on its behalf. The most recent Motion must be stricken as well. *See Juniper*
 20 *Networks, Inc.*, No. C 11-03906 WHA, 2001 U.S. Dist. LEXIS 122793 (striking motion to dismiss filed by
 21 defendants' non-attorney corporate representative).

22 **B. The Motion should be stricken because it violates the Court's Scheduling Orders,
 23 despite Toshin Kogyo having received adequate notice of applicable deadlines.**

24 Toshin Kogyo is not a new defendant to the various capacitors price-fixing cartel cases now
 25 consolidated before the Court. Indeed, it was named as a defendant in six of the seven direct purchaser
 26 actions and in all five of the indirect purchaser actions later consolidated in this Consolidated Action.
 27 *See* N.D. Cal. Case Nos. 14-cv-03264; 14-cv-03300; 14-cv-03698; 14-cv-04123; 14-cv-04514; 14-cv-

1 04704; 14-cv-04800 (direct purchaser complaint). *See also* N.D. Cal. Case Nos. 14-cv-03815; 14-cv-
 2 04403; 14-cv-04657; 14-cv-04677; 14-cv-04782 (indirect purchaser complaints).

3 Since the filing of the first of these cases in July 2014, the Court has promoted the orderly and
 4 efficient development of the Plaintiffs' claims by directing the Direct and Indirect Purchaser Plaintiffs
 5 respectively to file consolidated complaints and by setting a litigation schedule directed at streamlining
 6 issues and ruling on the legal sufficiency of all Plaintiffs' claims according to a consolidated schedule.
 7 *See, e.g.*, Dkt. 133, 309, 342. These Orders direct the parties to jointly brief their motions to dismiss,
 8 thereby eliminating the chaos that would result if all 45 Defendants moved on separate timeframes.

9 Other Defendants have conformed to the Court's Orders. For example, the Fujitsu entities, who
 10 unlike Toshin Kogyo were not named in these actions until DPPs filed the CCAC on November 14,
 11 2014, filed their dispositive motions under Rule 12, as ordered, on December 19, 2014. *See* Dkt. 469,
 12 479-80. Nitsuko Electronics Corporation, not named until the CCAC and not served until it received
 13 Hague Convention service thereafter, has secured qualified counsel and made a proper appearance. *See*
 14 Dkt. 598-99. Nippon Chemi-Con, who like Toshin Kogyo was named in the first-filed *Chip-Tech* action
 15 on July 18, filed its jurisdiction motion under Fed. R. Civ. P. 12 (b)(2) *and joined the other Defendants* in
 16 filing Rule 12(b)(6) motions. *See* Dkt. 478-80. There is no good reason why Toshin Kogyo could not
 17 have secured qualified legal counsel, followed the Court's Orders and participated in these filings.

18 Instead, Mr. Kasahara has twice filed motions to dismiss in violation of the rules and in disregard
 19 of the procedure the Court has established. As before, this latest Motion offers no reason why it should
 20 be briefed and heard at variance with the Court's litigation schedule set in its October 30, 2014 Minute
 21 Order (Dkt. 309) and its November 13, 2014 Scheduling Order (Dkt. 342). Toshin Kogyo has been on
 22 notice of DPPs' claims since at least October 29, 2014, allowing sufficient time for an appearance by
 23 qualified legal counsel and preparation of a proper motion to dismiss on or before December 19, 2014,
 24 consistent with the Court's instruction.

1 **C. Alternatively, Toshin Kogyo's Motion to Dismiss should be denied because of its**
 2 **procedural and substantive failings.**

3 The Court should strike this latest purported Motion, as before. But if the Court looks to the
 4 substance of Toshin Kogyo's improper filing, the Motion should be denied because this Motion like the
 5 last one fails to satisfy basic threshold standards for a party to win dismissal at the pleading stage.

6 A brief review of the new Motion reveals the same procedural and substantive deficiencies.

7 *First*, this Motion like the last one fails to follow basic procedural requirements. It gives no
 8 notice to DPPs as required by both the Federal Rules of Civil Procedure and the Northern District's
 9 Local Civil Rules. *See* Fed. R. Civ. P. 6; Civil L.R. 7-2(a). The Motion failed to notice a hearing date,
 10 though it appears that the Court has since provided one. It also ignores the Court's form requirements
 11 set forth in Civil L.R. 7-2(b), and thereby fails to make clear the authorities it relies upon for the relief it
 12 seeks. Once again, these deviations from baseline procedural requirements should not be excused.

13 *Second*, as before, the Motion improperly contests non-conclusory allegations and, at most,
 14 raises issues that should be addressed through discovery. The Motion's arguments do nothing to test
 15 the legal sufficiency of DPPs' allegations. *See* Dkt. 600 at ¶¶ 3-14. Mr. Kasahara conclusorily challenges
 16 DPPs' averments regarding the Court's personal jurisdiction over Toshin Kogyo and broadly disclaims
 17 its involvement in the capacitors price-fixing cartel and conspiracy alleged in the CCAC. This approach
 18 fails because, aside from the Court having to accept DPPs' non-conclusory allegations as true and
 19 construe them in the most favorable light, these factual challenges require discovery for their resolution
 20 and therefore do not warrant dismissal of the pleadings. *See, e.g., Harris Rutsky & Co. Ins. Servs., Inc. v.*
 21 *Bell & Clements Ltd.*, 328 F.3d 1122, 1129 (9th Cir. 2003) (without holding an evidentiary hearing,
 22 plaintiff need only make a prima facie showing of jurisdiction to avoid the defendant's motion to dismiss;
 23 courts will accept uncontested factual allegations as true, and draw all reasonable inferences and
 24 resolve factual conflicts in plaintiff's favor); *Circle Click Media LLC v. Regus Mgmt. Group LLC*, No. 12-
 25 cv-04000-SC, 2014 U.S. Dist. LEXIS 146408, at **5 n. 3, 6 (N.D. Cal. Oct. 14, 2014) (a prima facie
 26 showing is all that is required, even after jurisdictional discovery).

27 Mr. Kasahara's statements also do not constitute competent testimony capable of displacing any
 28 of DPPs' allegations in the CCAC because they are not sworn, as is required under Federal Rule of

1 Evidence 603. But should Mr. Kasahara return to Court with a sworn declaration seeking to establish
 2 the factual statements in the Motion as evidence, DPPs possess and are prepared to present more than
 3 sufficient evidence to demonstrate these statements' untruthfulness.

4 The Motion, just like the last purported motion to dismiss Mr. Kasahara filed, is procedurally
 5 improper and substantively insufficient. The Court should strike it from the record.

6 **IV. CONCLUSION**

7 For the reasons discussed above, Toshin Kogyo's purported Motion to Dismiss should be
 8 stricken for having been filed in violation of Civil L.R. 3-9(b). Alternatively, should the Court reach the
 9 merits of Toshin Kogyo's Motion to Dismiss, it should be denied for the reasons discussed above.

10 Dated: March 31, 2015

JOSEPH SAVERI LAW FIRM, INC.

11 By: /s/ Joseph R. Saveri
 12 Joseph R. Saveri

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